



OFFICE OF INJURED EMPLOYEE COUNSEL

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November 17, 2010

Rod Bordelon, Commissioner
Texas Department of Insurance, Division of Workers' Compensation
7551 Metro Center Drive, Suite 100, MS-1
Austin, Texas 78744-1645

Re: Rule Petition Concerning 28 Tex. Admin. Code § 130.12

Dear Commissioner Bordelon,

Pursuant to 28 Texas Administrative Code § 104.1 (Rule 104.1), the Office of Injured Employee Counsel (OIEC) petitions the Texas Department of Insurance, Division of Workers' Compensation (Division) to amend 28 Texas Administrative Code § 130.12(b)(1). The current text of Rule 130.12(b)(1) requires a party to request a Benefit Review Conference (BRC) to dispute a first certification of maximum medical improvement (MMI) or impairment rating (IR) if the first certification is from a designated doctor or if a designated doctor was already appointed to address MMI and IR at the time the certification was made. OIEC requests that the text of Rule 130.12(b)(1) be modified as follows:

Only an insurance carrier, an injured employee, or an injured employee's attorney or employee representative under 150.3(a) may dispute a first certification of MMI or assigned IR by filing a written dispute in the form and manner required by the division under §141.1 (~~relating to Requesting and Setting a Benefit Review Conference~~) or by requesting the appointment of a designated doctor, if one has not been appointed.

The Division has the authority to make the requested change under Texas Labor Code § 402.061.

Before the BRC rules were amended effective October 1, 2010, the practice many parties employed was to file a request for a BRC in order to avoid finality and to also request that the BRC not be set until a later date when the party was prepared to proceed on its dispute of the certification of MMI or IR. OIEC frequently followed this procedure, particularly in those instances where the injured employee first requested OIEC assistance in disputing a first certification of MMI and IR near the end of the 90-day period, in order to preserve the injured employee's right to dispute that certification. Effective October 1, 2010, under the amended BRC rules, this process is no longer available.

OIEC supports the goals of ensuring that parties have made documented efforts to resolve disputes and are fully prepared to proceed before they request a BRC. These goals were emphasized by the Sunset Advisory Commission in directing the Division to ensure parties are prepared before entering into the administrative dispute resolution process and for OIEC to cooperate with such direction. *See* Sunset Advisory Commission Decision Report, DWC Issue 1.1 and OIEC Issue 1.3, p. 24-a and 76-b, respectively. In response to Recommendation 1.3 that directs OIEC to work with the Division to ensure injured employees are fully prepared by Ombudsmen before attending a BRC, OIEC agreed with the recommendation and stated that it "understands the paramount need to ensure State resources are used efficiently and effectively." *See* Agency Response to Issue 1.3, Decision Report, p. 76-b. However, the recently amended BRC rules significantly

hamper OIEC's ability to ensure that injured employees are prepared prior to filing a request for a BRC and to ensure injured employees' rights are safeguarded.

In the case of a dispute of a first certification of MMI and IR, the purpose of the initial BRC request is to stop the 90-day clock as opposed to being a request to enter dispute resolution on the challenge to the certification of MMI and IR. In other words, the objective in filing the BRC request is to preserve the party's right to pursue a challenge to the certification, and it does not mean that the party is actually prepared to proceed with the BRC. To the contrary, a party must obtain an alternate certification and/or request a letter of clarification from the designated doctor to be in a position to make an informed decision of whether to pursue a dispute. A party files a BRC request simply because Rule 130.12(b)(1) establishes that as the single mechanism for disputing a first certification when the appointment of a designated doctor cannot be requested to register the dispute.

Amending Rule 130.12(b)(1) to require a party to file a written dispute of the first certification of MMI and IR would ensure that parties are not put in the position of either requesting a BRC before being prepared or forfeiting the right to do so. Currently, when an injured employee requests OIEC assistance near the end of the 90-day period and there is insufficient time to obtain the evidence necessary to pursue the dispute before the end of that period, the injured employee is nevertheless required to file a BRC request in order to avoid finality. Under the new BRC rules, this creates the unintended consequence of requiring parties to proceed to a BRC unprepared, which is in direct conflict with the purpose of amending the BRC rules and with the Sunset Advisory Commission's Recommendation and Decision.

OIEC's proposed amendment to Rule 130.12(b)(1), which would permit a party to file a written dispute of a first certification of MMI and IR, provides a simple, effective mechanism for a party to challenge the first certification of MMI and IR in those instances where a designated doctor cannot be requested to dispute. It would permit the party to register the dispute and to avoid losing the right to do so. Permitting parties to register their dispute in this fashion is akin to having insurance carriers contest compensability by filing a Notice of Denial of Compensability/Liability and Refusal to Pay (PLN01). Once the party challenging the certification of MMI and IR has obtained an alternate certification and/or sought clarification from the designated doctor, the party will be able to determine if the evidence supports the continued dispute of the certification. If so, the party may then file a request for a BRC and enter the dispute resolution process being fully prepared to pursue that dispute. Authorizing this proposed amendment to Rule 130.12(b)(1) goes to the heart of the Sunset Advisory Commission's Recommendation and Decision. Providing for such an amendment allows injured employees to safeguard their rights while not automatically thrusting them into an administrative dispute resolution proceeding unprepared. The Division's decision to have the same mechanism (DWC 045—Request for Benefit Review Conference) to preserve an injured employee's right to contest the first certification of MMI and IR and to enter into the administrative dispute resolution process raises a significant barrier to OIEC's commitment to fully prepare injured employees prior to filing a request for BRC and to ensure that State resources are used efficiently and effectively.

The revision of Rule 130.12(b)(1) proposed in this petition would be revenue neutral. Amending Rule 130.12(b)(1) replaces the requirement that parties complete and file a Request for a Benefit Review Conference (DWC 045) to dispute a first certification of MMI and IR in appropriate circumstances with the requirement that the party file a written dispute. Therefore, OIEC recommends that amended Rule 130.12(b)(1) become effective as soon as possible to safeguard injured employees' rights and to avoid the unintended consequence of the BRC rules that became effective October 1, 2010.

Thank you for your careful consideration of this rule petition. Please do not hesitate to contact me if you need further information to assist you in reaching a decision.

Sincerely,

A handwritten signature in black ink that reads "Brian White". The signature is written in a cursive style with a large, stylized "B" and "W".

Brian M. White
Deputy Public Counsel/Chief of Staff